Supreme Court, U.S.
FILED
AUG 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1949

In the Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM H. MARTIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the plea agreements of two government witnesses were properly admitted into evidence.
2. Whether the district court properly gave a willful blindness instruction.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Hasting v. *United States*, 461 U.S. 499 (1983)	11
United States v. *Beckett*, 724 F.2d 855 (9th Cir. 1984)	10
United States v. *Binker*, 795 F.2d 1218 (5th Cir. 1986), cert. denied, No. 86-741 (Feb. 23, 1987)	8
United States v. *Dennis*, 786 F.2d 1029 (11th Cir. 1986)	8
United States v. *Pacific Hide & Fur Depot*, 768 F.2d 1096 (9th Cir. 1985)	10
United States v. *Roberts*, 618 F.2d 530 (9th Cir. 1980), cert. denied, 452 U.S. 942 (1981)	6, 8, 9
United States v. *Rohrer*, 708 F.2d 429 (9th Cir. 1983)	9
United States v. *Tham*, 665 F.2d 855 (9th Cir. 1981), cert. denied, 456 U.S. 944 (1982)	9
United States v. *Townsend*, 796 F.2d 158 (6th Cir. 1986)	8

Statutes:

18 U.S.C. 371	2
18 U.S.C. 2312	2
18 U.S.C. 2313	2
18 U.S.C. 2314	2

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1949

WILLIAM H. MARTIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 815 F.2d 818.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1987. The petition for a writ of certiorari was filed on June 6, 1987; petitioner's counsel certified that he mailed it on June 4, 1987. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Rhode Island, petitioner was convicted on 19 counts charging interstate transportation of stolen motor vehicles, in violation of 18 U.S.C. 2312; 19 counts charging the sale and concealment of stolen motor vehicles, in violation of 18 U.S.C. 2313; two counts charging the interstate transportation of falsely made securities, in violation of 18 U.S.C. 2314; and one count of conspiracy, in violation of 18 U.S.C. 371. He was sentenced to a total of six-and-one-half years' imprisonment, to be followed by three years' probation, and was ordered to pay fines totalling $100,000. The court of appeals affirmed (Pet. App. 1-18).

1. The evidence at trial showed that petitioner and Smokey Cortellesso operated a scheme to sell stolen cars. Typically, either petitioner or Cortellesso would purchase a late-model, wrecked car from a salvage dealer in Rhode Island. Cortellesso and Nicholas Speakman would strip the wrecked car of all of its vehicle identification numbers and would hire James Galligan to steal a car that matched the wrecked car in make, model, year, and color. Cortellesso and Speakman would then place the vehicle identification numbers that had been removed from the wrecked car onto the matching stolen car. In the meantime, petitioner would apply for a duplicate title to the wrecked car. The duplicate title would not indicate that a salvage company had owned the car following an accident, but instead would show that the car was still owned by the original pur-

chaser. The stolen car would thus assume the identity of the wrecked car. Pet. App. 3, 10.

Petitioner and several men who worked for him transported the stolen cars from Rhode Island to New York, where they were sold at a wholesale auto auction. Petitioner sold the stolen cars under the name "Pershing Auto Sales" or "Belanger Auto Sales," although he was not authorized to do so. Pet. App. 3, 10. The stolen cars brought high prices at the wholesale auto auction because the chain of title appearing on the duplicate provoked no suspicion. The profits from the sale of each car were divided among the various participants in the scheme. Petitioner generally received $300 plus expenses for each car that was sold.

2. a. Prior to trial, both Cortellesso and Speakman pleaded guilty to one substantive count and to the conspiracy count pursuant to the terms of plea agreements with the government. In exchange for their pleas, the government agreed to dismiss the remaining counts if they gave "full and truthful testimony at any and all trials of the Defendants named in this indictment." Pet. 4 n.1. Each plea agreement also noted that "the giving of false information or false testimony shall be considered a failure to cooperate and will not only violate the terms of this agreement, but shall also expose [the defendant] to further criminal prosecution for making false statements to a government agency." *Ibid.* The agreements further stated that the government would recommend a substantial jail term on the conspiracy count and a non-jail sentence on the pertinent substantive count. The agreements were read to the jury during the course of Cortellesso's and

Speakman's testimony and were accompanied by limiting instructions.[1]

Defense counsel cross-examined both Cortellesso and Speakman extensively about the nature of the agreements (see, *e.g.*, 5 Tr. 200-201, 207-213, 260-276; 10 Tr. 81-83, 92-95). Although the prosecutor did not refer to the plea agreements at all during closing argument (see 14 Tr. 2-25), defense counsel referred to Cortellesso as a liar, a thief, and a potential murderer who "copped his deal" (14 Tr. 60,

---

[1] Upon admitting Cortellesso's plea agreement into evidence, the district court charged (5 Tr. 4):

> I am admitting that as evidence for a limited purpose and I think it's important that you understand and appreciate the parameters of that purpose. This agreement is not in any way proof of the guilt or innocence of these Defendants. * * * The significance, if there is any significance, to the plea agreement is for what value you may feel it has in weighing and assessing the credibility of Mr. Cortellesso as a witness. It sets out a framework under which his testimony is given and I think you're entitled to have that framework before you if you find it to be of any assistance in your determination as to whether or not and to what extent Mr. Cortellesso is a credible, believable, reliable witness. Those are determinations which you will have to make in the course of your finding of the facts. * * *

In telling the jury to view Cortellesso's testimony with "particular care and caution," the court stated (5 Tr. 5):

> In order to permit you to perform that heightened scrutiny of the testimony of this man who, as you will find out is a professed accomplice in the alleged conspiracy, I felt that you should have the knowledge of the terms and conditions of the plea agreement. * * *

The district court reminded the jury of these instructions prior to admitting Speakman's plea agreement (10 Tr. 3-4).

61, 63, 69-71, 82). Defense counsel discussed the plea agreements in detail, arguing to the jury that the agreements manifested the witnesses' bias (14 Tr. 77-78, 84-85). On rebuttal, the prosecutor responded to petitioner's claim that the plea agreements were grounds for inferring that Cortellesso and Speakman were biased in favor of the government, stating: "There's another clause in that plea agreement that says if they lie, they're in bigger trouble than they were when they walked into this courtroom because that's called perjury. And you decide whether they would risk that on top of everything else they had to risk" (14 Tr. 91). In its final charge to the jury, the district court gave yet another limiting instruction regarding the plea agreements (15 Tr. 18-19).

b. At the close of trial, the district court instructed the jury on willful blindness (15 Tr. 41-42):

> These charges deal in various aspects * * * with the element of knowledge. The law holds that the element of knowledge may be satisfied by inferences drawn from proof, if you find that it exists, that a Defendant deliberately disregarded what would otherwise have been obvious to him. If you find beyond a reasonable doubt a conscious purpose to avoid enlightenment, this would permit you to draw an inference of knowledge. Or stated another way, a Defendant's knowledge of a fact may be inferred from a willful disregard * * * or deliberate closing of the eyes in this case. And even should you so find, it is up to you as to the inferences to be drawn from any such evidence. I do caution you that a showing of negligence or mistake is not

sufficient to support a finding of willfulness or knowledge or deliberate disregard.

3. The court of appeals affirmed petitioner's convictions on all counts (Pet. App. 1-18). The court rejected petitioner's argument that the plea agreement should not have been introduced in its unredacted form because it constituted impermissible vouching by the prosecutor. The court observed that plea agreements like the ones in this case point in different directions, so that "a warning therein that the defendant will be prosecuted for false testimony enhances his credibility as a witness, but the rewards promised to him in the same document may undermine his credibility by showing that he stood to gain from incriminating others" (*id.* at 5). The court thus concluded that "[o]nly by viewing the entire agreement can the jury get the whole picture, from which to assess, as best it can, the probable motives or interests the witnesses could have in testifying truthfully or falsely" (*ibid.*). The court commented that *United States* v. *Roberts*, 618 F.2d 530 (9th Cir. 1980), cert. denied, 452 U.S. 942 (1981), on which petitioner relied, was "markedly different" because, in that case, the prosecutor had told the jury that a police officer had been monitoring the witness's testimony (Pet. App. 4). In this case, by contrast, the prosecutor did not improperly vouch for the veracity of the witness (*id.* at 7-8).

The court of appeals also rejected petitioner's claim that the district court erred in giving the jury an instruction on willful blindness or conscious avoidance of knowledge (Pet. App. 9-10). The court noted that such an instruction is appropriate when "(1) [the] defendant claims a lack of knowledge, (2) the facts suggest a conscious course of deliberate

ignorance, and (3) the instruction, taken as a whole, cannot be misunderstood by a juror as mandating such an inference" (*id.* at 9). The court found that the first requirement of the test was satisfied because petitioner "has all along claimed that Cortellesso and Speakman erred in testifying that [petitioner] was aware of the fraudulent scheme" (*ibid.*). Concerning the second requirement, the court held that, if the jury believed Cortellesso and Speakman's testimony that petitioner was intimately involved in the scheme, then the "instruction on willful blindness was redundant but surely not harmful" (*ibid.*). But, if the jury did not believe those two witnesses, then the "remaining evidence was sufficient to show that [petitioner] knew the cars were probably stolen and yet consciously followed a course of calculated ignorance" (*id.* at 10). In concluding that in that event the facts warranted a willful blindness instruction, the court noted that petitioner was an experienced car salesman, purchased the wrecked cars and sold the stolen cars at auction, applied for and received duplicate titles for each car sold, sold the cars under the Pershing or Belanger names without authorization, and had continuous contact with Cortellesso (*ibid.*). Finally, concerning the third requirement, the court approved the content of the willful blindness instruction, observing that the district court "did not suggest that the jury was in any way obliged to make adverse findings or inferences" (*id.* at 11).

ARGUMENT

1. Petitioner first contends (Pet. 7-11) that the district court improperly admitted Cortellesso's and Speakman's plea agreements into evidence. But, as the court of appeals correctly held, those agreements were not equivalent to improper vouching by the prosecutor. Accord *United States* v. *Townsend*, 796 F.2d 158, 163 (6th Cir. 1986); *United States* v. *Binker*, 795 F.2d 1218, 1223 (5th Cir. 1986), cert. denied, No. 86-741 (Feb. 23, 1987); *United States* v. *Dennis*, 786 F.2d 1029, 1046-1047 (11th Cir. 1986). Instead, they gave the jury a balanced account of the motivations affecting the testimony given by Cortellesso and Speakman. At trial, petitioner argued that dismissal of all but two counts of the indictment gave Cortellesso and Speakman an inducement for testifying in favor of the government. The government was entitled to show that false testimony could result in perjury charges, and therefore that Cortellesso and Speakman had a reason not to fabricate testimony. Only by considering all the inducements and penalties resulting from their arrangement with the government could the jury fairly weigh the witnesses' testimony.

Petitioner to the contrary (Pet. 8-10), the decision of the court below does not conflict with the decision of the Ninth Circuit in *United States* v. *Roberts*, 618 F.2d 530 (1982). As the court of appeals correctly observed (Pet. App. 4), *Roberts* is "markedly different." In *Roberts* the prosecutor told the jury that a police officer had been monitoring the witness's testimony for accuracy. The prosecutor was thus guaranteeing the truthfulness of the witness's testimony, and for that reason, the Ninth Circuit reversed. 618

F.2d at 537. The court did not hold that unredacted plea agreements are never admissible at trial. Instead, the court simply warned that the trial court "should consider the phrasing and content of the promise to ascertain its implications and decide whether an instruction to the jury would dispel any improper suggestions" (*id.* at 536). Accordingly, there is no reason to believe that the Ninth Circuit would not have upheld the admissibility of the plea agreements in this case, particularly in light of the fact that cautionary instructions were given. See *United States* v. *Rohrer*, 708 F.2d 429, 433 (9th Cir. 1983); *United States* v. *Tham*, 665 F.2d 855, 861-862 (9th Cir. 1981), cert. denied, 456 U.S. 944 (1982).

2. Petitioner also claims (Pet. 11-15) that the district court erred in giving a willful blindness instruction. He argues that the government contended that he acted with actual knowledge that the cars were stolen and that there was no evidence showing that he willfully blinded himself to that fact. But petitioner's theory of defense was that he was the ignorant "dupe" of Cortellesso (Pet. 3, 12), selling stolen cars at the New York auction without realizing that the cars were stolen. Petitioner argued to the jury that Cortellesso and Speakman lied when they testified that he knew of the scheme, and that all of his actions were consistent with the actions of a man who believed that he was engaged in the legitimate resale of used cars (see 14 Tr. 51-86). There was abundant affirmative evidence, however, showing that petitioner should have known that the cars were stolen, and that petitioner could only have avoided knowledge of that fact by deliberately clos-

ing his eyes to the truth. For instance, petitioner applied for duplicate titles to the wrecked cars that he purchased for Cortellesso. He then used the duplicates to sell cars in mint condition at the auction. And he falsely claimed he was representing Pershing or Belanger Auto Sales at the auction, even though he was not the authorized representative of either company. In light of these facts, petitioner had to know that Cortellesso was engaged in some sort of fraud. Thus, if the jury concluded, as petitioner argued it should, that Cortellesso and Speakman were lying with regard to petitioner's actual knowledge that the cars were stolen, it could nevertheless conclude that petitioner must have inferred that the cars he sold were stolen or have willfully blinded himself to that fact.

The line of Ninth Circuit decisions relied on by petitioner (Pet. 12-14) does not conflict with the decision of the court below in this case. Before a willful blindness instruction may be given, the Ninth Circuit requires that the "defendant claims a lack of guilty knowledge and the proof at trial supports an inference of deliberate ignorance." *United States* v. *Pacific Hide & Fur Depot, Inc.*, 768 F.2d 1096, 1098 (1985). The instruction is intended for the defendant who " 'shuts his eyes to an obvious means of knowledge.' " *United States* v. *Beckett*, 724 F.2d 855, 856 (1984). Thus, even in the Ninth Circuit, a willful blindness instruction would have been appropriate under the facts of this case since petitioner claimed that he lacked guilty knowledge and the proof supported the inference that if he lacked actual knowledge that the cars were stolen, he ignored a wealth of evidence to that effect.

Petitioner also complains (Pet. 14) that the willful blindness instruction allowed the jury to convict on a standard of negligence. On the contrary, the district court explicitly warned the jury that "a showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge or deliberate disregard" (15 Tr. 41-42). That instruction was sufficient to ensure that petitioner would be convicted only if the jury determined that he actually knew or deliberately chose not to learn that the cars were stolen.

In any event, there is no possibility that petitioner was harmed by the instruction in this case, because the evidence against him was overwhelming. He was one of the central players in the scheme to sell stolen cars. The testimony of Cortellesso and Speakman was corroborated by the testimony of the owner of the salvage company who sold the wrecked cars to petitioner and Cortellesso, by employees at the New York auction house, and by the wife of the owner of Belanger Auto Sales. Furthermore, petitioner inculpated himself by attempting to conceal the scheme as it began to unravel. For instance, when the auctioneer asked to see Cortellesso's "reconditioning" shop, petitioner refused to show it to him. And petitioner falsely denied to an insurance representative that he had any relationship with Cortellesso. 4 Tr. 314-324, 384-399; 7 Tr. 12-14, 22, 33-40; 8 Tr. 2-6, 25-29; 11 Tr. 25-31, 60; 13 Tr. 18, 20-22. Petitioner's attempt to conceal his relationship with Cortellesso showed that petitioner knew that he and Cortellesso were operating illegally. In light of the government's abundant proof, the willful blindness instruction was, at worst, superfluous and harmless. Cf. *Hasting* v. *United States*, 461 U.S. 499 (1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

AUGUST 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40467